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HOUSE BILL 392

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

Roberto "Bobby" J. Gonzales

AN ACT

RELATING TO AGING; AMENDING THE CONTINUING CARE ACT; CLARIFYING
DEFINITIONS; REVISING DISCLOSURE REQUIREMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 24-17-3 NMSA 1978 (being Laws 1985,
Chapter 102, Section 3, as amended) is amended to read:

"24-17-3. DEFINITIONS.--As used in the Continuing Care
Act:

A. "affiliate" means a person having a five percent
or greater interest in a provider;

B. "community" means a retirement home, retirement
community, home for the aged or other place that undertakes to
provide continuing care;

C. "continuing care" means furnishing, pursuant to
a contract that requires entrance or advance fees and service

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1 or periodic fees, independent living and health or health-
2 related services. Entrance or advanced fees do not include
3 security or damage deposit fees that amount to less than three
4 months' service or periodic fees. These services may be
5 provided in the community, in the resident's independent living
6 unit or in another setting, designated by the continuing care
7 contract, to an individual not related by consanguinity or
8 affinity to the provider furnishing the care. The services
9 include, at a minimum, priority access to a nursing facility or
10 hospital either on site or at a site designated by the
11 continuing care contract;

12 D. "continuing care contract" means an agreement by
13 a provider to furnish continuing care to a resident;

14 E. "person" means an individual, corporation,
15 partnership, trust, association or other legal entity;

16 F. "priority access to a nursing facility or
17 hospital" means that a nursing facility or hospital services
18 the residents of independent living units or that there is a
19 promise of such health care or health-related services being
20 available in the future;

21 G. "provider" means the owner or manager of a
22 community;

23 H. "resident" means, unless otherwise specified, an
24 actual or prospective purchaser of, nominee of or subscriber to
25 a continuing care contract; and

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1 I. "unit" means the living quarters that a resident
2 buys, leases or has assigned as part of the continuing care
3 contract."

4 Section 2. Section 24-17-4 NMSA 1978 (being Laws 1985,
5 Chapter 102, Section 4, as amended) is amended to read:

6 "24-17-4. DISCLOSURE.--

7 A. ~~[Any]~~ A person who provides or offers to provide
8 continuing care in this state shall furnish a current annual
9 disclosure statement and ~~[the]~~ a consumer's guide to continuing
10 care communities ~~[prepared by]~~ as furnished by the ~~[state~~
11 ~~agency on]~~ aging and long-term services department or the
12 attorney general's office to actual residents and to a
13 prospective resident at least seven days prior to entering into
14 a continuing care contract with the prospective resident.

15 ~~[Advertising, otherwise representing or contractual provisions~~
16 ~~indicating that a nursing facility or hospital services the~~
17 ~~residents of independent living units or advertising that there~~
18 ~~is a close structural proximity of residential units to nursing~~
19 ~~or acute care units shall imply an agreement to provide or~~
20 ~~offer to provide continuing care.]~~ For the purposes of this
21 subsection, the obligation to furnish information to actual
22 residents shall be deemed satisfied if a copy is given to the
23 residents' association, if there is one, and a written message
24 has been delivered to all residents that personal copies are
25 available upon request.

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B. The disclosure statement shall include:

(1) a brief narrative summary of the contents of the disclosure statement written in plain language;

(2) the name and business address of the provider;

(3) if the provider is a partnership, corporation or association, the names, addresses and duties of its officers, directors, trustees, partners or managers;

(4) the name and business address of any affiliate;

(5) a statement as to whether the provider or any of its officers, directors, trustees, partners, managers or affiliates, within ten years prior to the date of application:

(a) was convicted of a felony, a crime that if committed in New Mexico would be a felony or any crime having to do with the provision of continuing care;

(b) has been held liable or enjoined in a civil action by final judgment, if the civil action involved fraud, embezzlement, fraudulent conversion or misappropriation of property;

(c) had a prior discharge in bankruptcy or was found insolvent in any court action; or

(d) had any state or federal licenses or permits suspended or revoked or had any state, federal or industry self-regulatory agency commence an action against him

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1 and the result of such action;

2 (6) the name and address of any person whose
3 name is required to be provided in the disclosure statement who
4 owns any interest in or receives any remuneration from, either
5 directly or indirectly, any other person providing or expected
6 to provide to the community goods, leases or services with a
7 real or anticipated value of five hundred dollars (\$500) or
8 more and the name and address of the person in which such
9 interest is held. The disclosure shall describe such goods,
10 leases or services and the actual or probable cost to the
11 community or provider and shall describe why such goods, leases
12 or services should not be purchased from an independent entity;

13 (7) the name and address of any person owning
14 land or property leased to the community and a statement of
15 what land or property is leased;

16 (8) a statement as to whether the provider is,
17 or is associated with, a religious, charitable or other
18 organization and the extent to which the associate organization
19 is responsible for the financial and contractual obligations of
20 the provider or community;

21 (9) the location and description of real
22 property being used or proposed to be used in connection with
23 the community's contracts to furnish care;

24 (10) a statement as to whether the community
25 maintains reserves to assure payment of debt obligations and

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1 the ability to provide services to residents and a description
2 of such reserves;

3 (11) for those communities that charge an
4 entrance fee that were not in operation on [~~the effective date~~
5 ~~of the Continuing Care Act~~] June 14, 1985, an actuarial
6 analysis of the community performed by an actuary experienced
7 in analyzing continuing care communities;

8 (12) [~~a~~] an audited financial statement [~~and~~
9 ~~audit report as of the last fiscal year prepared in accordance~~
10 ~~with generally accepted accounting principles applied on a~~
11 ~~consistent basis and certified by a certified public~~
12 ~~accountant, including a cash flow statement or sources and~~
13 ~~application of funds statement and a balance sheet~~] as of the
14 end of the provider's last fiscal year [~~and a description of~~
15 ~~long-term obligations and the holders of mortgages and notes~~]
16 or a copy of the previous year's tax filings with the internal
17 revenue service;

18 (13) a sample copy of the contract used by the
19 provider; and

20 (14) a list of documents and other information
21 available upon request, including:

- 22 (a) a copy of the Continuing Care Act;
23 (b) if the provider is a corporation, a
24 copy of the articles of incorporation; if the provider is a
25 partnership or other unincorporated association, a copy of the

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1 partnership agreement, articles of association or other
2 membership agreement; and if the provider is a trust, a copy of
3 the trust agreement or instruments;

4 (c) resumes of the provider and
5 officers, directors, trustees, partners or managers;

6 (d) a copy of lease agreements between
7 the community and any person owning land or property leased to
8 the community;

9 (e) information concerning the location
10 and description of other properties, both existing and
11 proposed, of the provider in which the provider owns any
12 interest and on which communities are or are intended to be
13 located and the identity of previously owned or operated
14 communities;

15 (f) a copy of the community's policies
16 and procedures; and

17 (g) such other data, financial
18 statements and pertinent information requested by the resident
19 with respect to the provider or community, or its directors,
20 trustees, members, managers, branches, subsidiaries or
21 affiliates, ~~which~~ that is reasonably necessary for the
22 resident to determine the financial status of the provider and
23 community and the management capabilities of the managers and
24 owners, including the most recent audited financial statements
25 of comparable communities owned, managed or developed by the

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1 provider or its principal.

2 C. Each year, within one hundred eighty days after
3 the end of the community's fiscal year, the provider shall
4 furnish to actual residents [~~a current financial statement and~~
5 ~~audit report prepared in accordance with generally accepted~~
6 ~~accounting principles applied on a consistent basis and~~
7 ~~certified by a certified public accountant, including a cash~~
8 ~~flow statement or sources and application of funds statement~~
9 ~~and a balance sheet as of the end of the provider's last fiscal~~
10 ~~year, a description of long-term obligations and any other~~
11 ~~changes in the disclosure statement required to be furnished~~
12 ~~pursuant to Subsection A of this section]~~ the disclosure
13 statement as outlined in this section. For purposes of this
14 subsection, the obligation to furnish the required information
15 to residents shall be deemed satisfied if the information is
16 given to the residents' association, if there is one, and a
17 written message has been delivered to all residents stating
18 that personal copies of the information are available upon
19 request."

20 Section 3. Section 24-17-5 NMSA 1978 (being Laws 1985,
21 Chapter 102, Section 5) is amended to read:

22 "24-17-5. CONTRACT INFORMATION.--

23 A. A continuing care contract shall be written in
24 clear and understandable language.

25 B. A continuing care contract shall, at a minimum:

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1 (1) describe the community's admission
2 policies, including age, health status and minimum financial
3 requirements, if any;

4 (2) describe the health and financial
5 conditions required for a person to continue to be a resident;

6 (3) describe the circumstances under which the
7 resident will be permitted to remain in the community in the
8 event of possible financial difficulties of the resident;

9 (4) list the total consideration paid,
10 including donations, entrance fees, subscription fees, periodic
11 fees and other fees paid or payable; provided, however, that a
12 provider cannot require a resident to transfer all [~~his~~] the
13 resident's assets to the provider or community as a condition
14 for providing continuing care and the provider shall reserve
15 [~~his rights~~] the right to charge periodic fees;

16 (5) describe in detail all items of service to
17 be received by the resident such as food, shelter, medical
18 care, nursing care and other health services and whether
19 services will be provided for a designated time period or for
20 life;

21 (6) provide as an addendum to the contract a
22 description of items of service, if any, [~~which~~] that are
23 available to the resident but are not covered in the entrance
24 or monthly fee;

25 (7) specify taxes and utilities, if any, that

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1 the resident must pay;

2 (8) specify that deposits or entrance fees
3 paid by or for a resident shall be held in trust in a [~~cash~~
4 ~~escrow account in a New Mexico trust company or in the trust~~
5 ~~department of a~~] federally insured New Mexico bank until the
6 resident has occupied his unit [~~and that after the resident has~~
7 ~~notified the trustee that he has occupied his unit, the money,~~
8 ~~including interest unless otherwise specified, shall be~~
9 ~~released to the provider~~] or the resident's contract
10 cancellation period has ended;

11 (9) state the terms under which a continuing
12 care contract may be canceled by the resident or the community
13 and the basis for establishing the amount of refund of the
14 entrance fee;

15 (10) state the terms under which a continuing
16 care contract is canceled by the death of the resident and the
17 basis for establishing the amount of refund, if any, of the
18 entrance fee;

19 (11) state when fees will be subject to
20 periodic increases and what the policy for increases will be;
21 provided, however, that the provider shall give advance notice
22 of not less than thirty days to the residents before the change
23 becomes effective and increases shall be based upon economic
24 necessity, the reasonable cost of operating the community, the
25 cost of care and a reasonable return on investment as defined

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1 by rules promulgated by the aging and long-term services
2 department no later than January 31, 2006;

3 (12) state the entrance fee and periodic fees
4 that will be charged if the resident marries while living in
5 the community, the terms concerning the entry of a spouse to
6 the community and the consequences if the spouse does not meet
7 the requirements for entry;

8 (13) indicate funeral and burial services that
9 are not furnished by the provider;

10 (14) state the rules and regulations of the
11 provider then in effect and state the circumstances under which
12 the provider claims to be entitled to have access to the
13 resident's unit;

14 (15) list the resident's and provider's
15 respective rights and obligations as to any real or personal
16 property of the resident transferred to or placed in the
17 custody of the provider;

18 (16) describe the rights of the residents to
19 form a residents' association and the participation, if any, of
20 the association in the community's decision-making process;

21 (17) describe the living quarters purchased by
22 or assigned to the resident;

23 (18) provide under what conditions, if any,
24 the resident may assign the use of a unit to another;

25 (19) include the policy and procedure with

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1 regard to changes in accommodations due to an increase or
2 decrease in the number of persons occupying an individual unit;

3 (20) state the conditions upon which the
4 community may sublet or relet a resident's unit;

5 (21) state, in the event of voluntary absence
6 from the community for an extended period of time by the
7 resident, what fee adjustments, if any, will be made;

8 (22) include the procedures to be followed
9 when the provider temporarily or permanently changes the
10 resident's accommodations, either within the community or by
11 transfer to a health facility; provided that the contract shall
12 state that such changes in accommodations shall only be made to
13 protect the health or safety of the resident or the general and
14 economic welfare of all other residents of the community;

15 (23) if the community includes a nursing
16 facility, describe the admissions policies and what will occur
17 if a nursing facility bed is not available at the time it is
18 needed;

19 (24) describe, if the resident is offered a
20 priority for nursing facility admission at a facility that is
21 not owned by the community, with which nursing facility the
22 formal arrangement is made and what will occur if a nursing
23 facility bed is not available at the time it is needed;

24 (25) include the policy and procedures for
25 determining under what circumstances a resident will be

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1 considered incapable of independent living and will require a
2 permanent move to a nursing facility. The contract shall also
3 state who will participate in the decision for permanent
4 residency in the nursing facility and shall provide that the
5 resident shall have an advocate involved in that decision;
6 provided that if the resident has no family member, attorney,
7 guardian or other responsible person to act as [~~his~~] the
8 resident's advocate, the provider shall request the local
9 office of the human services department to serve as advocate;

10 (26) specify the types of insurance, if any,
11 the resident must maintain, including medicare, other health
12 insurance and property insurance;

13 (27) specify the circumstances, if any, under
14 which the resident will be required to apply for medicaid,
15 public assistance or any other public benefit programs;

16 (28) state, in bold type of not less than
17 twelve-point type on the front of the contract, that a contract
18 for continuing care may present a significant financial risk
19 and that a person considering a continuing care contract should
20 consult with an attorney and with a financial advisor
21 concerning the advisability of pursuing continuing care.
22 Provided, however, failure to consult with an attorney or
23 financial advisor shall not be raised as a defense to bar
24 recovery for a resident in any claims arising under the
25 provisions of the Continuing Care Act;

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1 (29) state, in bold type of not less than
2 twelve-point type on the front of the contract, that nothing in
3 the contract or the Continuing Care Act should be construed to
4 constitute approval, recommendation or endorsement of any
5 continuing care community by the state of New Mexico;

6 (30) state in immediate proximity to the space
7 reserved in the contract for the signature of the resident in
8 bold type of not less than twelve-point type the following:

9 "You, the buyer, may cancel this transaction at any time
10 prior to midnight of the seventh day after the date of this
11 transaction. See the attached notice of cancellation form for
12 an explanation of this right."; and

13 (31) contain a completed form in duplicate,
14 captioned "Notice of Cancellation", which shall be attached to
15 the contract and easily detachable, and which shall contain in
16 twelve-point boldface type the following information and
17 statements in the same language as that used in the contract.

18 "NOTICE OF CANCELLATION

19 Date: _____

20 (enter date of transaction)

21 You may cancel this transaction without any penalty or
22 obligation within seven days from the above date. If you
23 cancel, any payments made by you under the contract or sale and
24 any negotiable instrument executed by you will be returned
25 within ten business days following receipt by the provider of

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1 your cancellation notice, and any security interest or lien
2 arising out of the transaction will be canceled.

3 To cancel this transaction, deliver a signed and dated
4 copy of this cancellation notice or any other written notice,
5 or send a telegram, to: _____

(Name of Provider)

7 at _____

(Address of Provider's Place of Business)

9 not later than midnight of _____

(Date)

I hereby cancel this transaction.

(Buyer's Signature)

(Date)"."

16 Section 4. Section 24-17-6 NMSA 1978 (being Laws 1985,
17 Chapter 102, Section 6) is amended to read:

18 "24-17-6. ESCROW REQUIREMENTS.--Any deposits or entrance
19 fees paid by or for a resident shall be held in trust in a
20 [~~cash escrow account in a New Mexico trust company or in a~~
21 ~~trust department of a~~] federally insured New Mexico bank until
22 the resident has occupied his unit [~~After the resident has~~
23 ~~notified the trustee that he has occupied his unit, the money,~~
24 ~~including interest unless otherwise specified, shall be~~
25 ~~released to the provider] or the resident's contract~~

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1 cancellation period has ended."

2 Section 5. Section 24-17-8 NMSA 1978 (being Laws 1985,
3 Chapter 102, Section 8) is amended to read:

4 "24-17-8. CONSUMER'S GUIDE TO CONTINUING CARE
5 COMMUNITIES.--The office of the attorney general and the [~~state~~
6 ~~agency on~~] aging [~~shall~~] and long-term services department may
7 publish and distribute a consumer's guide to continuing care
8 communities and [~~shall~~] may publish an annual directory of
9 communities in New Mexico."

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